No. 76-1829

In the Supreme Court of the United States

OCTOBER TERM, 1977

JESSIE M. MCDONNEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 550 F. 2d 1010.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1977. A petition for rehearing was denied on May 24, 1977 (Pet. App. 5a). The petition for a writ of certiorari was filed on June 22, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's right against self-incrimination was violated by a pre-trial meeting between the prosecutor and the trustee in bankruptcy, where the trustee did not disclose any information received from petitioner's immunized testimony.

STATUTE INVOLVED

11 U.S.C. 25(a), provides in pertinent part:

> The bankrupt shall * * * (10) at the first meeting of his creditors, * * * and at such other times as the court shall order, submit to an examination concerning the conduct of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate or the granting of his discharge; but no testimony, or any evidence which is directly or indirectly derived from such testimony, given by him shall be offered in evidence against him in any criminal proceeding * * *.

STATEMENT

After a jury trial in the United States District Court for Northern District of Texas, petitioner was convicted of twelve counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to consecutive terms of five years' imprisonment each on Counts 1 and 2, and to terms of five years' imprisonment on the remaining counts, to be served concurrently with each other and Count 1.[1] The court of appeals affirmed *per curiam* (Pet. App. 1a-4a).

The evidence adduced at trial established that petitioner and co-defendant Pao operated the Southwest Coin Exchange from early 1973 until May 16, 1974, when the partnership filed a bankruptcy petition (Tr. 251, 294). Southwest Coin Exchange sold bags of silver coins for investment purposes to customers who were encouraged to buy on margin, so they could acquire as many bags as

[1]Co-defendant Joseph W. Pao pleaded guilty to Counts 1, 2, and 3. He received concurrent terms of three years' imprisonment on Counts 1 and 2, followed by a probationary term of three years on Count 3.

possible. For each bag ordered, Southwest was to purchase a bag of silver coins, tag it with the customer's name, and store it in a vault. Delivery could be taken on one day's notice and payment of the full purchase price and accrued interest (*e.g.*, Tr. 73, 80-82, 104-105, 124).

Contrary to its representations to investors, Southwest did not fill purchase orders and the silver available for delivery was usually only a small percentage of that contracted for (Tr. 294-299). When Southwest petitioned for bankruptcy, the firm had outstanding contracts for delivery of 998 bags of silver coins, but less than nine bags were on hand (Tr. 252-253, 310). Furthermore, an examination of the company's records disclosed that the majority of the investors' money was used for speculation in the commodity market and foreign gold mine stocks (Tr. 307-309), although investors were never informed that their funds were used for any purpose other than the purchase and storage of bags of silver coins (*e.g.*, Tr. 83, 96, 110, 118-119, 127).

Petitioner's misrepresentations resulted in an out-of-pocket loss to Southwest investors of approximately $921,000 and a loss of 3.8 million dollars based on the market value of silver when the petition for bankruptcy was filed (Tr. 251, 309-310).

Petitioner testified before the trustee in bankruptcy under the use immunity conferred by 11 U.S.C. 25(a) (Tr. 262-263).

ARGUMENT

Petitioner contends that his conviction must be reversed because after he testified in bankruptcy proceedings, there was a conference between the prosecutor and the trustee in bankruptcy of Southwest Coin Exchange.

1. As the court of appeals held (Pet. App. 4a), petitioner did not object at trial to any portion of the trustee's

testimony, and therefore has waived whatever objection he may have had, unless admission of the testimony was plain error. Fed. R. Crim. P. 52(b). Petitioner attempts to avoid this formidable hurdle by claiming that his objection is not to the testimony itself, but to the pre-trial contact between the trustee and the prosecutor (Pet. 8). This argument overlooks the fact that petitioner's claim is one of self-incrimination; consequently, his objection must go to the evidence introduced against him at trial or there is nothing to object to. Petitioner cannot be incriminated by an informal conference occurring prior to trial, no matter what occurred there; he can be incriminated only by evidence put before the jury at trial. See *Napolitano* v. *Ward*, 457 F. 2d 279 (C.A. 7). Consequently, his failure to object at trial defeats his present claim save as to plain error.

2. Moreover, here as in the court of appeals, petitioner "alleges that his immunity was somehow breached, but does not give any specific example of same" (Pet. App. 4a). Petitioner's argument (Pet. 7) that he "has had no possible opportunity to know if, or to what extent, there may have been a violation [of his privilege] in this specific case" is unconvincing. Petitioner knows what his testimony before the trustee was (indeed, the testimony was transcribed and petitioner presumably has a copy of the transcript). Petitioner was also present throughout the two-day trial and heard the evidence against him.

If petitioner or his counsel had genuine grounds to believe that his privileged testimony somehow led to evidence used against him at trial, there is no reason why he did not make some claim, either at trial, *in camera*, or at the very least in a post-judgment motion, setting forth the connection, thus putting the burden of showing an independent source on the government. *Kastigar* v. *United States*, 406 U.S. 441, 459-462. The fact that petitioner was absent from the conference between the trustee and the prosecutor is irrelevant. His failure even to suggest the manner in which his privilege was allegedly violated further undercuts the validity of that claim.

3. In any event, the government has fully met its burden of proving that the evidence against petitioner had an independent source, as *Kastigar* requires. The trustee's entire (and uncontradicted) testimony on this point follows (Tr. 262-263):

> [by petitioner's counsel, on cross-examination]
>
> Q. All right, sir. Have both Mr. Pao and Mr. McDonnel submitted to interrogation in the bankruptcy proceedings?
>
> A. Yes, sir.
>
> Q. And they have been examined there under oath and pursuant to Court Order?
>
> A. Yes, sir.
>
> Q. And were the facts that you learned from those two investigations part of your overall investigation into the affairs of Southwest Coin?
>
> A. Yes, sir.
>
> Q. Prior to your testimony here today have you had any conversations with either the United States Attorney or the Postal Inspectors?
>
> A. Yes, sir.
>
> Q. And have you attempted to assist them in the performance of their duties?
>
> A. I have answered their questions that they have asked me.

Q. And you have answered those questions based upon, I assume, all of the information developed in your investigation?

A. With the exception of the information returned from Mr. Pao, Mr. McDonnel, through examination in the bankruptcy proceedings, with the exception of that, yes.

Q. You mean you were able in your mind to sort of sever out what you learned from that and just tell them what you learned from other sources?

A. Yes, sir.

Q. I see.

MR. PALMER: I'll pass the witness.

Thus, the trustee's "testimony that he had not transmitted outside of his office any information about [petitioner's] appearance is sufficient to show no use by federal agents of any information garnered from that appearance." *United States* v. *Bianco*, 534 F. 2d 501, 510 (C.A. 2). If the prosecution did not know the substance of the privileged testimony, it could not have used the testimony or its fruits in developing or prosecuting the case against petitioner. It necessarily follows that the evidence against petitioner "was derived from legitimate independent sources" (*Kastigar, supra*, 406 U.S. at 461-462), and the court of appeals correctly so held (Pet. App. 4a).[2]

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[2]Petitioner's concern that a trustee untrained in the law might be unable to comply with the requirement that immunized testimony not be divulged to the prosecutor is without foundation in the present case. The trustee was an attorney experienced in bankruptcy law (Tr. 248-250), and both the trustee and the prosecutor were fully cognizant of their duties under the immunity provision (Tr. 213, 262-263).

Moreover, petitioner appears to concede (Pet. 5) that the government's burden of proving non-use of the immunized testimony would have been met if the prosecutor had appeared at the first meeting of creditors and requested that neither the transcript nor its contents be disclosed. There is no significant difference between that procedure and the facts of this case, since the prosecutor did not seek the immunized testimony (Tr. 213) and the trustee did not disclose it (Tr. 262-263).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1977.